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United States Supreme Court

Nos. 677 - 680

October Term, 1942.

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PETITION FOR WRIT OR WRITS OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OR WRITS OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Presentation of Petition.

The Harborside Warehouse Company, Inc., a corporation of the State of New Jersey, respectfully presents this

Petition for a writ or writs of certiorari as the case may be, to review the final judgments of the Court of Errors and Appeals of the State of New Jersey, the highest Court of that State in which a decision in the above-entitled four cases could be had, entered November 2, 1942 (Record, pp. 619-625).

II.

Jurisdiction.

The basis upon which it is contended by Petitioner that this Honorable Court has jurisdiction to review the judgment of the Court of Errors and Appeals of New Jersey in this cause is Section 237-(b) of the Judicial Code, as amended (U. S. C. A., Title 28, Section 344-(b), in that Petitioner by the said judgment has been denied due process of law and the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

III.

Question Presented.

Whether under the undisputed facts Petitioner has been denied due process of law and the equal protection of the laws under the Fourteenth Amendment by the action of the State Board of Tax Appeals, which, under its own ruling, is a "Court," (*Duke Power Company* v. *Hillsborough Township,* 20 N. J. Misc. Rep. 240, 257), on appeal from the Hudson County Board of Taxation, affirmed by the Supreme Court and by the Court of Errors and Appeals, in (as Petitioner contends) disregarding the testimony presented before it by Petitioner respecting the true value of its property, which was unrefuted, ignoring settled principles of

law pertaining thereto, and determining the amount for which the property should be assessed upon a personal visit to and inspection of the property, without statutory power to do so, and without notice to Petitioner and without affording it an opportunity to cross examine the members either as to their qualifications to determine value according to the statutory test *infra,* or to ascertain whether they reached their conclusion as to value in accordance with that statutory exaction or by some other unwarranted method, or otherwise to be heard before judgment.

IV.

Brief Statement of the Case.

In order to clearly estimate the Board's action in the respect noted, it is deemed requisite to review as briefly as consonant with the somewhat voluminous record, the case as presented to the State Board, and later reviewed by the Supreme Court and finally by the Court of Errors and Appeals.

> *Harborside Warehouse Co. Inc.* v. *Jersey, City, &c.,* 19 N. J. Misc. Rep. 222, Record p. 60; 128 N. J. Law 263, Record, p. 603; 129 N. J. Law 62, Record p. 616.

V.

Statement of the Parties, and Summary of the Matter Involved.

1. The Harborside Warehouse Company (referred to herein as the "Warehouse Company"), is a corporation duly organized and existing under the laws of the State of New Jersey, and was such during the period for which the taxes were assessed and levied against it by the City of Jersey City, hereinafter referred to.

2. The City of Jersey City (referred to herein as the "City"), is a municipal corporation of the State of New Jersey, located in the County of Hudson, in said State, and was such during the periods in the preceding paragraph mentioned.

3. In the years 1935 to 1938, inclusive, the Warehouse Company was the owner of certain property located in said City, consisting of warehouse buildings, equipment and appurtenances. It did not own the land. The buildings are erected upon land leased from The Pennsylvania Railroad Company, which also operates railroad tracks, cars and other railroad equipment on parts of the tract (Record, p. 86, line 26). It had been previously leased to the Pennsylvania Dock and Warehouse Company, which had the buildings in course of construction when bankruptcy of that Company intervened (Record, pp. 143-148; 264-266; Exhibit P-2, pp. 325-408). Under that lease the buildings revert to the lessor at the expiration of the term (Record, p. 383, line 36, *et seq.*).

4. The City, through its agents, servants and officials, assessed said warehouse property, exclusive of the land, for taxation purposes for the years 1935, 1936, 1937 and 1938, respectively, as of the first day of October of each respective preceding year, in the amount of $5,137,000.00, having previously acquiesced in a reduction from $5,137,000.00 to $3,000,000.00 by the State Board for 1932 and by the County Board for 1933, and itself assessed it for $3,000,000.00 for 1934. (See Tax History, Exhibit R-1, Record p. 411.)

5. All those assessments were exclusively governed by the statute of New Jersey, Rev. Stat. 1937, Sec. 54:4-1, Sec. 54:4-23, which establishes the criterion of value. It provides as follows:

> "The assessor shall ascertain the names of the owners of all real property situate in his taxing dis-

trict, and, after examination and inquiry, determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October first next preceding the date on which the assessor shall complete his assessments, as hereinafter required."

And 54:4-26 provides that:

"In listing the names of owners and properties the assessor shall follow such forms and methods as may be prescribed by the state tax commissioner, who may by rule direct the assessor in a taxing district to determine the true value of each parcel of real estate assessed by him without the building and improvements and to note the same on the list, and to determine and note separately the true value of every building and other structure on each parcel, and add and carry out the result as the assessed value of the parcel, and in such case the receipt given for the payment of the tax shall contain the separate valuations." • • •

These provisions were in effect in practically the same form at the periods of the several assessments in question. (P. L. 1932, Ch. 181, p. 309.)

6. As previously stated, the Warehouse Company's buildings were assessed by the City separately from the land, the land being assessable by the State Tax Commissioner as Second Class railroad property under the Railroad Act (R. S. 54:22-1; 54:22-3; 54:23-1; 54:24-2, 7 to 11; P. L. 1941, Ch. 291, p. 773, Secs. 7, 16, 17, 19, 24).

See *Koch* v. *Jersey City*, 118 N. J. Law 85, affd. 119 Law 432.

True value, within the meaning of the tax laws, was defined by the Court of Errors and Appeals in *State Board* v. *C. R. R. Co.*, 48 N. J. Law 146, at 311, as follows:

"The third clause of the provision, that property shall be assessed for taxes according to its true value,

> excludes an assessment according to cost, number, weight, measure, fineness, or any other standard except true value—that is, the value which it has in exchange for money—"

And in *N. J. Bell Telephone Co.* v. *Camden*, 122 N. J. Law 270, at 272, the Supreme Court stated that:

> "The words 'true value' have been judicially defined to mean the price in money which a willing seller could obtain for the property from a willing buyer at a fair sale as of the assessment date under private contract."

7. In conformity with other statutory provisions (R. S. 54:3-21; 54:2-39), appeals to the Hudson County Board of Taxation were taken by the Warehouse Company from the assessments of each of said years, and the Hudson County Tax Board (referred to herein as the "County Board"), denied the City's increases of 1935, 1936 and 1937, but refused to reduce the City's assessment of 1938. Appeals from the County Board's judgments were taken to the State Board of Tax Appeals, of the State of New Jersey (referred to herein as the "State Board"), by the City, for the years 1935, 1936 and 1937, and by the Warehouse Company for the year 1938. These appeals did not come on for hearing until February 5, 1940 (Record, p. 82). The State Board ordered the assessments for each of said years to be fixed at $5,000,000 (Record, pp. 58, 73), and the Supreme Court of New Jersey, upon review by certiorari, affirmed the action of the State Board (Record, pp. 603-607). The Court of Errors and Appeals, on appeal affirmed the judgments of the Supreme Court (Record, pp. 616-625). It is to review those judgments that the present application for certiorari is made to this Honorable Court.

8. By stipulation, to avoid unnecessary repetition, the appeals were consolidated for hearing, and the testimony taken before the State Board was made applicable to the

assessments for all four of the years involved, as of the respective assessment dates (Record, pp. 83-84). The testimony thus taken was included in the State of the Case in both the New Jersey Supreme Court and the Court of Erros and Appeals, and is referred to herein as the "Record", and the Exhibit numbers mentioned are as they appear therein.

9. The record as thus consolidated was reviewed accordingly in the Supreme Court and the Court of Errors and Appeals, but separate judgments were entered for each of the four years' assessments involved (Record, pp. 603, 616).

10. Petitioner therefore prays that this Petition and the supporting Brief and Record be deemed and made applicable to each of the four captioned proceedings thus consolidated and heard and determined in the respective courts below, thereby avoiding repetitious prolixity and conserving the Court's convenience, without the necessity of filing separate petitions.

VI.

The Tax History.

Competent evidentially under *Koch* v. *Jersey City*, 118 N. J. Law 85, affd. 119 Law 432, *supra*.

10. The "Tax History" (Exhibit R-1, Record, p. 411), covering the period from 1931 to 1938, inclusive, shows that after the first year, namely, 1931, when the assessment was referred to as an "Erecting Value," the City's assessment upon the buildings in question, except for 1934, was $5,137,000.00, and that despite judgments by the State and County Boards refusing the increase and fixing the assessment at $3,000,000.00, the City has continued to establish the increase, except as noted for 1934, when it fixed this assessment at $3,000,000.00 of its own accord.

Exhibit R-1 (Record, p. 411) discloses that the State Board reduced the assessment for 1932 from $5,137,000.00 to $3,000,000.00, but it does not show how that reduction came about. The records and judgment of the State Board, however, show that that reduction was consented to by the City (Record, p. 413). The judgment was marked Exhibit R-2, *id.*, for identification,* but was excluded from evidence (Record, pp. 149-152, 412). The Petitioner respectfully submits that its exclusion was error, and that the State Board should have taken judicial notice of its own records and proceedings in this respect, as urged upon the hearing (Record, pp. 251-254).

11. For 1933 the assessment of $5,137,000.00 was renewed by the City, but the County Board reduced it to $3,000,000.00, which was in accord with the State Board's reduction of the 1932 assessment. There is no record of an appeal by the City from the County Board's reduction for 1933. In other words, the City acquiesced in that reduction.

12. For 1934 as above indicated, the City still further acquiesced by voluntarily assessing the property itself at $3,000,000.00, and, of course, took no appeal from its own assessment.

13. For 1935, 1936 and 1937, the City renewed the assessment of $5,137,000.00, and in each year the County Board reduced it to $3,000,000.00. The City's figure was repeated for 1938, which the County Board did not reduce. But there is nothing in the record to show any changed conditions or other circumstances to indicate any justification whatever for the County Board's action respecting the 1938 assessment refusing the reduction. It is clearly arbitrary.

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* Reports of U. S. Dept. of Commerce, offered at pages 186, 299, 300 of the Record, were also by duplication marked R-2, Id. (Record, pp. 414-419.)

VII.

The Evidence.

(a) The City's Case.

14. There was no competent evidence produced by the City. The only evidence presented by the City before the State Board was the testimony of two witnesses whose figures were confined to construction cost, as of the respective assessment dates, with a slight allowance for physical depreciation and obsolescence, leaving, as they termed it, a "sound value" varying from $6,100,500.00 to $7,226,800.00, according to the testimony of the City's witness Mr. Robertson (Record, p. 89, lines 27-40), and from $6,049,887.98 to $7,063,742.84, according to the City's witness Mr. Phillips (Exhibit P-1, Record, p. 112, line 1; p. 316, lines 3-6).

15. The estimate of Mr. Robertson was based entirely upon a calculation having for its foundation the cubical contents of the buildings (Record p. 90, line 20, to p. 100), —the so-called "cubical contents" method, which, at the best, is but a guess; and while the estimate of Mr. Phillips was based upon what he termed a "quantity survey" (Record, pp. 104, line 36; 120-123), founded upon the plans and specifications on file in the Building Department of the City, he had no specific knowledge of whether or not the buildings had been constructed according to those plans and specifications (Record, pp. 95, line 15; 113-114, line 20).

16. Mr. Robertson did not examine the buildings until about a year and a half prior to the Hearing, and again in December of 1939 (Record, pp. 86, line 3; 87, line 31), and Mr. Phillips did not examine them until January, 1940 (Record, p. 115, line 35). Neither witness produced sufficient data upon which an estimate could be computed even

approximating reproduction costs, neither demonstrated any reliable qualification to express a competent opinion of the reproduction cost, nor did either express an opinion as to the *true value** of the property assessed.

17. On the hearing before the State Board the City did not show any change by way of enhancement or augmentation of value which could be urged in justification of the County Board's action for 1938, or asserted to justify the State Board in sustaining the County Board's failure to reduce for that year, in the face of the full knowledge of its reductions for the previous years.

18. In view of point being made by the City regarding the non-completion of the building, it is important to note that the building was practically completed in 1931, and that between that time and May, 1934, when nothing further remained to be done, only $240,200.54 was spent for completion, a considerable portion of which was more strictly for maintenance, which becomes in a sense negligible, and would in nowise be a factor justifying the increases for which the City contends (Record, pp. 88-89; 153-158; 254-256; Exhibit P-1, p. 316, lines 3-6).

19. Neither Mr. Robertson nor Mr. Phillips stated, nor did any witness for the City state, an opinion as to the "true value" of the property assessed, or what reasonably it would sell for, as of the respective assessing dates, as between a willing seller and a willing buyer, at a fair and bona fide sale by private contract, which is the true test of value under our statute and the decisions of our Courts; nor was any consideration given by them to the elements of income or rental returns, depreciation in values due to economic depression, functional depreciation resulting from changed business conditions, the fact that at the ex-

* Italics throughout are ours unless otherwise noted, except latin phrases, and citations.

piration of the lease the buildings revert to the lessor, or any other economic factor. Cost of reproduction, less a slight allowance for depreciation and obsolescence, alone was considered (Record, pp. 90-100; 104-112; 119-123). And as stated on the record by counsel for the City, concurred in by the President of the State Board (Record, p. 99, lines 20-40; p. 100, lines 1-28), that was not for the purpose of fixing a taxation value:

> "Mr. McCarthy: Oh, no, I am not asking this man to give me figures for tax purposes. He is only here to testify to what the reproduction cost was on the various taxing dates.
>
> "President Quinn: That was my understanding of his testimony."

As early as *C. R. R. Co.* v. *State Board*, 49 N. J. Law 1, 6 (1886), Mr. Chief Justice Beasley, speaking for the Supreme Court, characterized cost of construction or reproduction as the basis of determining value, as *fallacious* and *"utterly puerile"*, and pointed out that that was only a factor that might be taken into account in determining true value, but that no one chargeable with the administration of taxation laws could be taken to have confined himself strictly to such a puerile conception of the fixing of value of property.

And, spanning the intervening years, in which many like expressions of judicial views have been voiced, it is appropriate to note that this principle has been carried over and applied by President Quinn, who presided at the hearings before the State Board, in his very recent opinion in *Schetty* v. *Jersey City*, reported in 18 N. J. Misc. Rep. 37, where, at pages 38-39 of the report, with reference to the *City's witnesses*, he said:

> "Testimony which is based exclusively upon reproduction cost, and disregards selling price, carries but little weight. *Id.* The testimony of respondent's

> witness upon valuation of improvements is, for this reason, standing alone, of little probative force, not having been adduced in support or corroboration of the opinion of the witness as to the fair sale price of the property.— * * * Nothing therein contained (*Koch* v. *Jersey City,* 118 N. J. Law, 85) affects the continued soundness of the fundamental principle that such testimony is not persuasive unless directed to the operative factor of fair sale price, whether of land or building."

Yet he ignored this principle in the instant case.

And the approval of such judicial views is expressed in the very recent case of *Atlanta B. & C. R. R. Co.* v. *United States*, 296 U. S. 33, 80 L. Ed. 25, where the United States Supreme Court, in sustaining the Interstate Commerce Commission's refusal to consider the rate-base valuation of the railroad which had been previously reported by the Commission as the value of its common stock, or to set it up on its books as an asset figure, at pages 38-39 of the Report, page 29, L. Ed., said:

> "In reaching its conclusion, it (the Commission) considered the report filed in 1923 in the valuation proceeding, and also the evidence as to the cost of reproduction, and said 'Clearly, the only pertinent value is that for purposes of sale or exchange. Cost of reproduction is to be given little, if any, weight in determining such value, in the absence of evidence that a reasonably prudent man would purchase or undertake the construction of the properties at such a figure.' Affirmed."

Such evidence of purchase and sale value *was* absent in the present case on the part of the City, but was affirmatively present in support of the taxpayer's contention of valuation, as hereinafter indicated.

20. The City, therefore, failed to produce any evidence to sustain its contention that the assessments for 1935, 1936 and 1937, as reduced by the County Board of Hudson

County, should be increased, or that the assessment for 1938, which the County Board failed to reduce, should be sustained.

It is the Petitioner's contention that the valuation as thus found by the taxing authorities now sustained by the State Board, works a denial of due process of law and of the equal protection of the laws, under the Fourteenth Amendment of the Constitution of the United States, and that the action of the State Board in the present proceedings likewise works a denial of due process of law and the equal protection of the laws under the Fourteenth Amendment, as well as being violative of the Constitution and Laws of the State of New Jersey. And it was so asserted in both the Supreme Court and the Court of Errors and Appeals.

21. The City has the burden of sustaining its contention under its appeals for 1935, 1936 and 1937, and it has failed to do so. And there is nothing in the record to sustain the assessment for 1938. The reductions granted by the County Board for 1935, 1936 and 1937 should therefore stand, and the reduction should be made in the assessment for 1938 in accordance with the contention of the Warehouse Company. A judgment must be based on evidence, or it cannot stand.

Gibbs v. *State Board*, 101 N. J. Law 371;
International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291, 299, 74 L. Ed. 431, 441.

(b) The Warehouse Company's Case.

22. Although at this juncture of the case before the State Board, a dismissal of the City's appeals as to 1935, 1936 and 1937, and the reduction sought by the Warehouse Company as to 1938, would have been justified, nevertheless in view of the State Board's attitude in this respect

as expressed in the *Colonial Life* case (18 N. J. Miss. Rep. 60, 62, 66; certiorari dismissed, 126 N. J. Law, 197), the Warehouse Company proceeded to present its testimony with regard to the assessments.

23. It was shown conclusively (and it was in nowise refuted or attempted to be refuted by the City) that from its inception the Warehouse Company has operated at a deficit, which has persisted throughout its whole history, and which has steadily mounted, despite every effort made by a capable and experienced management to overcome it. It was also shown that, due to economic factors and basic changes in the warehouse business, especially in the region where these warehouses are situate, tending materially to diminish the trend of patronage for which the project was primarily designed, the venture had proven to be an economic disappointment, and the management had been compelled to seek other avenues of patronage, but with only partial success (Record, pp. 158-165; Exhibit R-3, Record, pp. 420-459; 580, lines 30-40; 583, lines 30-40; 586, lines 30-40; 589, lines 30-40; Exhibit R-4, pp. 301, 460-577).

24. 32 percent of the total rentable area in the warehouse was unoccupied on October 1, 1938. The management was, therefore, in line with warehouses in the metropolitan area as to occupancy, based on the reports of the Department of Commerce.

25. This was also shown by independent testimony to be a general condition in the warehouse business, particularly by the evidence of George W. Duke, a warehouseman of many years' experience in Jersey City, who graphically described particularly the depleting effect of truck operations as presently conducted, constituting a myriad of floating warehouses and rendering the necessity of the stationary warehouse practically nil (Record, pp. 192-195). This is

also amplified by George Morrison, then Executive Vice President of the Warehouse Company, who also showed the effect on the cold storage features by the establishment of those facilities by the operators of plants at the sources of production, doing away in a large measure with the necessity of patronizing a terminal warehouse (Record, pp. 158-165).

26. In support of the testimony regarding general warehouse conditions in the vicinity in question, and also in and around the Port of New York, Reports of the United States Department of Commerce for the years 1934-1939, inclusive, were referred to by Mr. Morrison and were offered in evidence. The Board, however, excluded the offer. Petitioner respectfully submits that the Board erred in thus excluding the documents offered (Exhibit R-2, *id.*,* Record, pp. 186-187, 299-300, 414-419).

27. Mr. Thomas Ryer and Mr. William Stack, who are real estate men of wide experience, over a long period of time, and whose testimony is received and held in high esteem by our judicial tribunals, both testified with regard to the true value of the property involved, after taking into consideration all the various elements heretofore discussed (Record, pp. 256-261; 278, 279, 280-293; 294-298).

28. With full consideration having been given to all the elements which enter into the determination of *true value* as the basis for taxation, the valuation placed upon the property in question, as between a willing seller and a willing buyer, as of the respective assessment dates, was:

By Mr. Ryer	$3,000,000.00
	(Record, p. 280, line 15)
By Mr. Stack	3,160,000.00
	(Record, p. 297, line 26)

* Duplication of Exhibit number. See footnote, *ante*, page 8.

Those figures were based upon a tax burden of assessments in the amount of $3,000,000.00; but based upon a tax burden of the City's contended assessments, viz: $5,137,000.00, they both stated that their valuations would be modified and depreciated to the figure of $1,700,000.00, as between a willing seller and a willing buyer (Record, pp. 289-290; 298-299).

29. Earnings or lack of earnings, while not exclusively determinative of actual valuation, still are elements in determining true value, especially in relation to commercial enterprises. Yet the taxing authorities have failed or refused to effectively consider them as depreciating factors of value, and in so doing so have again denied the Warehouse Company due process of law and the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, as well as denied its rights under the Constitution and Laws of the State of New Jersey.

> "The value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use."
>
> *Cleveland &c. Ry. Co.* v. *Backus*, 154 U. S. 439, 445; 38 L. Ed. 1041, 1046.

See also,

> *Borough of Bradley Beach* v. *State Board, &c.*, 124 N. J. Law 36.

30. The proofs presented by the Warehouse Company show what reasonably could have been thus obtained for the property involved, as of the respective assessment dates:

Mr. Ryer said	$3,000,000.00
Mr. Stack said	3,160,000.00

both based on a tax burden of a $3,000,000.00 assessment, and only $1,700,000.00 if based on a tax burden of $5,137,000.00.

31. The City did not even attempt to answer that proposition. The City, however, put in evidence the lease and the accompanying papers, showing the bankruptcy proceedings, which included the deed of the Selling Master in bankruptcy (Exhibit P-2, Record, pp. 144-148; 264-266; 325-408), and it is therein recited (Record, p. 340, line 23), that the consideration paid for the property was $2,100,000.00; that it was sold at public sale, on the steps of the Court House, in Jersey City on September 27, 1933; that the purchasers thereof were the highest and only bidders; and that the sale at that price was duly confirmed by the United States District Court for the District of New Jersey; and that notice of said sale was published at least once a week for four successive weeks previous to the sale in daily newspapers circulating in the County of Hudson, and in the Cities of New York and Philadelphia, and also posted in numerous public places in said County of Hudson.

32. Injecting this element in evidence by the City cannot be ignored in a fair presentation of the facts. Obviously the City is bound by the uncontroverted facts which the deed shows. On its face the deed shows that the sale took place September 27, 1933, a few days prior to the assessment date for the 1934 tax, and the deed is dated and was recorded October 24, 1933, but a comparatively few days after the assessment date for the 1934 tax (October 1, 1933); and for the year 1934, it should be borne in mind, the City placed its assessment at $3,000,000.00 doubtless having recourse to the deed and its expressed consideration, which is well known, universal routine of taxing authorities.

The bankrupt and its creditors had full knowledge and ample notice of the sale, with full opportunity to bid, or to

object to bids of others if not satisfied with them. No such bids or objections to bids appear. The mortgagee, and those for whom it was Trustee, also must have been satisfied, and the Court confirmed the sale.

Of course the taxpayer could not have introduced the deed in evidence except with the consent of the City, for the reason that a sale such as the deed evinces, would not technically have met the requirements of 54:4-23 (*ante*, p. 5), as a criterion of value; but the City having placed the deed in evidence over objection by the taxpayer, it is bound by whatever the uncontroverted facts are. Obviously the purchasers approach the class of "willing purchasers". They were not obliged or forced to purchase if they did not think it desirable. There were no competing bidders and again it is a matter of common knowledge that swarms of prospective bidders haunt the bankruptcy sales, ready and waiting to pick up bargains. Evidently, this property was not regarded as a bargain at the sale price obtained sufficient to attract other bids. The purchaser must therefore be regarded as being perfectly willing to buy.

In *Klipper* v. *City of Union City*, 55 N. J. Law Journal, 249, at 251, President Weaver stated that:

> "In the case of *State* v. *Randolph*, 25 N. J. L., p. 427, the Supreme Court determined that the amount a property would sell for at a public sale was a good *prima facie* criterion of its value. The Court quoted as authority the case of *State* v. *Danser*, 3 Zabriskie, p. 552, and *State* v. *Tunis, ibid.* 546. These cases are to the effect that the actual value of property is its price in the market."

33. This, therefore, while technically not conclusive, still is some criterion of true value, and cannot be overlooked as evidence of what the property would sell for to a prudent purchaser. And, in view of the proof, what would the "pru-

dent man'' referred to by President Quinn in the *Colonial Life Insurance* case above referred to (18 N. J. Misc. 60, 66) pay for it ''as a permanent investment''? In the light of the tax burden, increasing from $111,659.49 in 1934 (Exhibit R-3, Record, p. 420, line 18) to $151,549.70 in 1938 (*Id.*, Record, p. 446, line 21) on the assessment as reduced to the figure of $3,000,000.00 on a steadily increasing tax rate in Jersey City, plus the deficit in operation resulting from changing factors destructive of warehousing success, what *prudent man* would take the load upon his shoulders even at the $3,000,000.00 price? And when the 1939 statement is considered (*Id.*, Record, p. 453, line 20), with its tax deduction of $250,094.23 and its operating deficit of $170,445.65, where could a purchaser be found, at any price? The supporting testimony of the several witnesses produced in behalf of the Warehouse Company, will amply justify the answer, NOWHERE!

VIII.

Failure to Give Effective Consideration to the Elements of True Value.

34. The record also amply justifies the assertion of arbitrary and confiscatory action. A glance at the Tax history will show that the assessment of $5,137,000.00 was applied first in 1932. Despite the downward trend in property values ever since, and even ignoring the depreciation element allowed by the City's own witnesses, the assessment has been retained, clearly indicating no effort on the part of the assessing authorities to perform that judicial ascertainment of true value, which is the duty the law casts upon them. The amount is apparently caught out of the air with no tangible legal elements upon which to base it, and

entirely ignoring the legal elements which are judicially established as being required to be considered. It may also have been actuated by the thought expressed by counsel in the colloquy relating to the admission of the Board's judgment in the 1932 tax (Record, pp. 150, lines 35-40; 151, lines 1-16):

> "Mr. McCarthy: Just as I have said, that don't reflect anything. This company itself was in the hands of the Federal District Court in Bankruptcy.
>
> "As far as the reason why Jersey City settled it, it may have been an absolute error on the part of the person who did it.
>
> "It might have been actuated on the fact that the municipality was short of current cash.
>
> "You and I settle litigation day in and day out, because of other reasons that won't reflect the true value or reconstruction cost.
>
> "Mr. Hartpence: It might also be, by the same token, that the City finds itself short of cash and practically doubles the assessment on the property without showing any relation between true value and the assessment.
>
> "Mr. McCarthy: That is why we have appeals."

35. That there has been a complete failure to give *effective* consideration to the required legal elements in determining *true value* in making the assessment seems patent and obvious. An analysis of the Tax History and of the proofs will demonstrate that the City, in making its assessments, failed to make appropriate reductions in the face of the conditions established by the proofs, or of reductions granted by the County or State Boards in given instances, but continued to assess at unsustainable peak figures, patently arbitrarily and without any effort at judicial determination, all through the period of depreciating values, including the years now involved in these appeals.

36. That the Warehouse Company was thus denied its right under the Constitution and Laws of the State of New Jersey, to have its property taxed at its *true value*, seems self-evident, and the Warehouse Company asserts that failure to consider those elements adverted to, by any taxing authority or tribunal having jurisdiction or determination or review, is violative of its constitutional and legal rights, not only under the Constitution and Laws of the State, but also under the Fourteenth Amendment of the Constitution of the United States and the several provisions thereof.

37. The proofs show, and the Court should also judicially notice, the increase of 18.8 percent in the tax rate in Jersey City over the period 1934-1938 inclusive which together with the insistence upon excessive and unwarranted assessments, has driven the tax burden up to a point where it has become confiscatory, and renders the holding and operation of property in that municipality at an advantageous profit practically impossible, which is asserted also as a denial of due process of law within the prohibition of the Federal Constitution.

IX.

The Warehouse Company's History.

38. Construction of the Warehouse buildings, commenced in June, 1929 (Record, p. 152, lines 32-35). Of necessity, the contracts must have been made, and the construction figures fixed, long prior thereto, when "Boom" prices and "Boom" hopes still prevailed. The "great collapse" in all classes of property, struck this project full in the face at its birth, but too late to enable it to recede from its obligations. Bankruptcy for its original projec-

tors The Pennsylvania Dock and Warehouse Company, was inevitable. It soon followed, and further progress was stopped in its tracks. After the Receivership and Bankruptcy proceedings were terminated, the Harborside Warehouse Company in taking over the project was confronted with a colossal task. As stated by Mr. Morrison, the Vice President, at page 171, lines 17-19 of the Record, regarding a phase then under discussion:

> "It has taken us a lot of time to build up this rent roll with the smell of a bankruptcy around it."

Throughout the whole period of its existence there has been a general downward trend in property values, as above pointed out (Record, pp. 261, 280, 283, 284, 289, 296, 297), and the Warehouse Company has operated at a deficit, steadily mounting (Record, pp. 160, line 17; 233-235; 242-244; 248-250; 301, lines 16-20; 580, line 39; 583, line 38; 586, line 38; 589, line 39, Exhibit R-3, Record, pp. 420-459).

From an analysis of the Exhibits of the Warehouse Company it is apparent that the gross income of the Company from this property has been so low that even if all the deductions incident to the funded debt were eliminated with a resultant net income capitalized at 6%, in every year the investment value thus produced would be less than $1,150,000, and an assessment of even $3,000,000 is grossly excessive. Further, if during the years in question, the taxes had been assessed upon a basis of $2,100,000, namely, the purchase price, capitalization of the income without deduction of charges on account of funded debt would not exceed $1,900,000 even in the best year. While if the taxes were based upon an assessment of $5,137,000, and even if the funded debt charges were eliminated, the tax assessed for each year would be so great that a deficit would result. Under the latter assessment there would be no funds available for interest on bonded indebtedness. It is apparent,

therefore, that under prudent and efficient management, the situation is such that it would be difficult to secure a willing buyer who would be interested in a purchase price of even $2,100,000, much less at $3,000,000 or $5,137,000.

39. Reproduction cost is not the test of *true value* within the meaning either of the Constitution and Laws of this State or of the United States; and inasmuch as there is no competent evidence in this case in behalf of the City's assessment or to sustain its contention, it seems irrefutable that its appeals for 1935, 1936, and 1937 should have been dismissed and that the Warehouse Company's prayer for reduction of the 1938 assessment should have been granted.

X.

The City's Failure of Proof of "True Value" Contrasted with the Affirmative Proof of the Warehouse Company.

40. The increases in the assessments which the City seeks to establish and justify are clearly arbitrary, confiscatory, violative of the legal and Constitutional principles judicially asserted in protection of the taxpayer and a denial of those rights to the Warehouse Company, under both the State and Federal Constitutions, and are unsustainable in law or in fact. No proofs have been produced by the City to show that the property involved was assessed by the City at its "true value", as required by law and the Constitutions, or in accord with the standards fixed by judicial exaction. The City apparently relied solely and entirely upon the alleged cost of construction or reproduction of the buildings, less a slight allowance for depreciation. Its testimony in this respect is incompetent and shown to have no weight, and is devoid of even an expression of

its relation to true value, as legally defined, and as stated *ante*, p. 11, was disavowed as an offer for taxation for purposes. It entirely ignores the factors of earnings, general economic depression, steadily depreciating property values, continued specific functional depreciation resulting from changed and changing basic conditions in warehouse operation, causing increasing operating deficits, and other factors which the assessing authorities are bound to judicially investigate, to which they are bound to give *effective consideration*, and which no prudent prospective purchaser would overlook or fail to consider in determining what price he would willingly pay for the property in order to profitably operate it as a going business enterprise. Neither would such purchaser overlook the steadily increasing tax burden which the City's asserted exorbitant assessment, coupled with its likewise steadily increasing tax rate, imposes, persistently advancing to a point where inevitably it will become confiscatory. All these elements were taken into consideration by the witnesses for the Warehouse Company in fixing their expression of true value as between a willing buyer and a willing seller under a *bona fide* contract, which is the correct criterion under the law and the State and Federal Constitutions. And this was in nowise refuted by the City.

The State Board's disregard of the evidence and fixing the value, as an appellate tribunal, by its own inspection of the property without notice to the taxpayer or opportunity to be heard before judgment.

41. Disregarding those elements, however, the State Board, upon an inspection of the property without notice to the taxpayer (Record, p. 73, line 32), determined that the property of the Warehouse Company had a true value of $5,000,000 as of each of the assessing dates herein involved,

and the assessments were ordered fixed in said sum. A copy of the State Board's opinion and of its judgments for the four years involved, respectively, are in the Record at pages 13, 28, 42, 57, and 60 to 73.

42. It is apparent therefrom that the State Board's determination and judgments are based upon erroneous legal theories regarding the true value of the property assessed, for taxation purposes, under the tests fixed by statute and judicial decisions, in that:

(a) It disregards the tax history;

(b) It fails to give weight to the presumption in favor of the County Board's determination, as to 1935, 1936 and 1937, with no evidence to warrant a change in value for the year 1938 by the County Board;

(c) It sets up an erroneous theory of determining the value of the buildings in connection with the value of the land, not sustained by law;

(d) It ignores the evidence produced by the Warehouse Company showing the true value of the property as between a willing buyer and a willing seller, which evidence is in nowise refuted by the City;

(e) It sets up the cost of reproduction less depreciation as a basis of true value, contrary to law, and disregards the fact that the City itself did not assert such cost as being the true value of the property for taxation purposes;

(f) It bases its conclusions on statements of the evidence which are not sustained by the Record with respect to the use of the property and the business management thereof;

(g) It gives effect to the so-called book value of the property, which is not a legal criterion of true value for taxation purposes;

(h) It gives unwarranted effect to alleged common ownership of land and buildings, which does not exist and which is not a material legal factor in determining the true value of the property involved;

(i) It fixes and determines a valuation of the property greatly in excess of its true value for taxation purposes, under the evidence and the law pertaining to the same;

(j) It fails to give effective consideration to, and to apply, elements indispensable to the determination of the true value of the property in question for taxation purposes, thereby denying the Warehouse Company due process of law and equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution, as well as of the Constitution and laws of the State of New Jersey;

(k) It is based on a personal visit to an inspection of the property by the State Board without notice to Petitioner and without opportunity for cross examination or other action by Petitioner to ascertain to what extent the Board's conclusions and judgment may have been influenced by such ex parte investigation, being a further denial of due process of law in violation of the Fourteenth Amendment of the United States Constitution, as well as of the Constitution and laws of the State of New Jersey.

43. The Board of Tax Appeals held that (a) depreciated reproduction cost of the buildings should receive some weight in arriving at statutory true value of the buildings, but only in its relationship to selling or market value of the property, depending on the facts of particular cases; (b) on an appeal of the assessments on improvements alone the test is the extent to which the improvements on the land have increased the selling value of the entire parcel over the selling value of the land were it vacant, and this should

be established by showing the residual value remaining after deducting the true value of the land from the true value of the land and improvements, as a unit, the latter being established by real estate experts; and this the Board held had not been done (Record, p. 67, lines 30 *et seq.*). The effect of these holdings of the Board is to justify its giving weight to depreciated reproduction cost in the absence of competent testimony as to selling price, thus ignoring and failing to apply its own ruling, cited *supra*, and further to discard the statutory rule, which is that the full and fair value of each parcel of property is to be determined by what in the judgment of the assessing officer it would sell for at a fair and bona fide sale by private contract on the preceding October 1st, the statutory assessment date. Moreover, the rule announced by the Board, even if applicable in other cases is not applicable to the facts in this case, because:

1. The land on which the buildings are erected is not owned by the taxpayer—Harborside, and is not subject to local assessment by Jersey City. This land is held by The Pennsylvania Railroad Company under a long term lease from the owners—a matter of common knowledge,—and is land used for railroad purposes outside the main stem, and is, therefore, subject to assessment only by the State Tax Commissioner, and cannot be assessed locally by Jersey City (Record, pp. 86, line 26; 264-266; 325-408).

2. The buildings are not property used for railroad purposes, and hence are subject to local assessment by Jersey City, and cannot be assessed by the State Tax Commissioner.

3. The land thus leased by the Railroad Company,—it is not the *owner*, as stated in the Board's opinion (Record, p. 64, line 5)—is assessed to the Railroad Com-

pany by the State Tax Commissioner, and the taxes thereon, as levied and computed by the Commissioner, are paid by the Railroad Company to the State, and on the distribution required by statute such taxes are turned over to Jersey City.

44. And supplementary to the foregoing, but in no wise in limitation of the same, Petitioner avers that the said judgments of the State Board of Tax Appeals respectively are erroneous for the following reasons:

1. Failure of the Board of Tax Appeals to give proper consideration and weight to the tax history covering the period 1931 to 1938 inclusive, showing the effort of City, despite the judgments by the State and County Boards fixing the assessments at $3,000,000, and refusing increases, to establish amounts of $5,137,000, except for 1934, in which year the City of its own accord fixed the assessment at $3,000,000.

2. Refusal of the Board to admit in evidence, or to take judicial notice of the Record and judgment of the Board, showing that the City consented to the reduction in the assessment for 1932 from $5,137,000 to $3,000,000.

3. There is no record of any appeal by the City of Jersey City from the County Board's reduction of the assessment for 1933 from $5,137,000 to $3,000,000. The City apparently acquiesced in this reduction.

4. For each of the years 1935-1936-1937 the County Board reduced the assessment from $5,137,000 to $3,000,000. For 1938 the County Board did not reduce the $5,137,000 assessment made by the City in that year. There is no record of any justification for the County Board's action for 1938, which, it is claimed, was therefore arbitrary.

5. The only evidence offered by the City to sustain its assessments of $5,137,000 is the testimony of two witnesses whose figures were confined to construction costs with slight allowance for depreciation and obsolescence.

6. The estimates of reproduction costs made by these two witnesses were fallacious and lead to absurd results.

7. Failure of the City to produce any witness to testify to an opinion as to the "true value" of the property assessed, or what it would reasonably sell for as between a willing buyer and a willing seller at a fair and bona fide sale by private contract.

8. Failure of the City's witnesses to give consideration to earnings of Harborside or to depreciation in values due to economic depression or to functional depreciation due to changed business conditions.

9. Failure of the Board to give consideration and weight to the evidence showing that Harborside had operated at a steadily increasing deficit throughout its history despite efforts made by capable and experienced management to overcome it.

10. Failure of the Board to consider and give weight to the testimony of Harborside's expert witnesses who took into consideration all of the elements which enter into a determination of true value as a basis for taxes and arrived at valuations of the property under assessment on the basis of a full and fair selling price at a bona fide sale by private contract, *i. e.*, as between a willing seller and a willing buyer.

11. The Board's judgments are based upon erroneous legal theories regarding determination of the true value of the property assessed for purposes of taxation.

The Board has ignored the legal test fixed by statute and sustained in judicial decisions.

12. The consideration which the Board gave to the figure at which the buildings are carried on Harborside's Books. Such figure is not of any probative value.

13. The consideration which the Board gave to the alleged control of Harborside by the Railroad Company and the erroneous and improper inference therefrom drawn by the Board.

14. They are in divers other respects contrary to law and to the evidence adduced:

(a) The Board disregarded the presumption in favor of the Petitioner arising from the judgment of the County Board, fixing the assessment at $3,000,000 for 1935, 1936 and 1937; and there was nothing shown to justify the County Board's action in refusing to depart from that figure in 1938.

West Orange v. *Essex Board, etc.*, 18 N. J. Misc. 383 at 386;
T. & M. Co. Trac. Co. v. *Mercer Board, etc.*, 91 N. J. Law, 105 at 108;
Newton Trust Co. v. *Atwood*, 77 N. J. Law, 141 at 143;
Hackensack Water Co. v. *North Bergen*, 18 N. J. Misc. 627 at 630;
City of Hoboken v. *M. & E. R. R. Co.*, 19 N. J. Misc. 100, 101 (1941).

In the *West Orange* case, *supra*, President Quinn said:

"And, in this connection, it is unquestionable that the presumption is in favor of any action of the

County Board, • • • with a consequent burden of proof resting upon any objector to its action."

There was no testimony to warrant the Board ignoring the tax history in this respect. (Record, pp. 64, 65.)

Koch v. *Jersey City*, 118 N. J. Law 85: Affirmed 119 N. J. Law 432, *supra*.

(b) Emphasis is laid on identity of parties, viz.: Harborside Warehouse Company and the Pennsylvania Railroad Company, which are separate corporate entities (Record, p. 72, line 12). Yet President Quinn decided that that had no bearing upon the right of the taxpayer in the case of *Newark* v. *Weyerhaeuser Timber Co.*, 15 Atl. Rep. (2nd) 224.

(c) Stress was also laid upon preferential rights granted to the Pennsylvania Railroad Company (Record, p. 72, line 10).

This is erroneous; no such privilege existed. (See Record, p. 138, line 12).

(d) Book value was also stressed (Record, p. 73, line 14). But in *Hackensack Water Co.* v. *Haworth*, 19 N. J. Misc. Rep. 217 at 221:

President Quinn pointed out that it had no controlling value or effect, even where it was admitted by the taxpayer that it represented valuation for all purposes, and not peculiarly for rate-making purposes.

Valuation for rate-making purposes is not material in determining "true value" within the test prescribed for taxation.

Woodcliff Lake v. *State Board, etc.*, 14 N. J. Misc. 132; affirmed 117 N. J. Law 114;

Hackensack Water Co. v. *State Board, etc.,* 122 N. J. Law 596, at 598;
Haworth v. *State Board,* 127 N. J. Law 67, 69-70;
Universal Ins. Co. v. *State Board,* 118 N. J. Law 538, 540.

(e) The Board distinguished the *Timer* case (12 N. J. Misc. 125) and overlooked the fact that land-owner and structure-owner in the present case are not one and the same, and that the structure of the Harborside Company is specifically assessed to it by the City, while the land is owned by others and leased to the Railroad Company (Record, pp. 264-266); and hence the land and the building could not be assessed as a unit; nor could it be sold as a unit without the consent of all parties in interest, which would be an element that would detract still more from the value as between the willing purchaser and the willing seller. And it should also be noted that in the case cited in the opinion of the Board at page 71, line 16, of the Record (*Becker* v. *Little Ferry,* 125 N. J. L. 141), Mr. Justice BODINE in the opinion of the Court of Errors and Appeals (126 N. J. L. 338, at 339) points out that:

> "Buildings on leased land are usually taxable as real estate where the land on which they stand or rest is taxable."

Koch v. *Jersey City,* 118 N. J. Law, 85: Affirmed 119 N. J. Law 432, *supra.* 1937 R. S. 54:4-26, *supra.*

The lease and record title in this respect were put in evidence by the City, and they are bound by it.

(f) Nevertheless the Board laid the proof aside and visited the Harborside plant and placed its own personal

value on it (Record, p. 73, line 32), entirely different from that shown by any of the testimony.

It is not shown that they possessed any technical knowledge or experience that qualified them for such action.

Hackensack Water Co. v. *North Bergen,* 18 N. J. Misc. 627 at 630;

Long Dock Co. Assessors, 86 N. J. Law 592 at 596 to 601;

U. N. J. R. R. Co. v. *State Board,* 100 N. J. Law 131 at 136 at 137.

And without an opportunity to be heard, the taxpayer would be denied due process of law.

Kearny v. *State Board,* 4 N. J. Misc. Rep. 834, and authorities cited; affd. 103 N. J. Law 699;

Trenton &c. Trac. Co. v. *Mercer Tax Board,* 92 N. J. Law 398, 402;

Londoner v. *Denver,* 210 U. S. 373, 386; 52 L. Ed. 1103, 1112.

(g) The property must be taxed according to its present use and condition, not upon fanciful or conjectural use, and at its true value.

Mueller Co. v. *State Board,* 126 N. J. Law 141;

U. N. J. R. R. Co. v. *State Board,* 101 N. J. Law 303, 313;

State, Colwell v. *Abbott,* 42 N. J. Law 111 at 114-115;

Haworth v. *State Board,* 127 N. J. Law, 67, 69, *supra;*

Stevens Institute v. *State Board,* 105 Law 99.

(h) Mention is also made of the declination by Harborside officials to prospective applicants for space (Record, p. 72, line 15).

This was shown to have been done at the express request of the Jersey City officials. (See Record, pp. 307, lines 15-18; 310, lines 20-25; 311, lines 22-38).

XI.

In Conclusion:

44. Taking all these elements and factors into consideration, therefore, it is respectfully submitted that the increases in the assessments which the City seeks to establish and justify are clearly arbitrary, confiscatory, violative of the legal and Constitutional principles judicially asserted in protection of the taxpayer and a denial of those rights to the Warehouse Company, under both the State and Federal Constitutions, and are unsustainable in law or in fact. No proofs have been produced by the City to show that the property involved was assessed by the City at its "true value", as required by law and the Constitution, or in accord with the standards fixed by judicial exaction. The City apparently relied solely and entirely upon the alleged cost of construction or reproduction of the buildings, less a slight allowance for depreciation. Its testimony in this respect is incompetent and shown to have no weight, and is devoid of even an expression of its relation to true value, as legally defined. It entirely ignores the factors of earnings, general economic depression, steadily depreciating property values, continued specific functional depreciation resulting from changed and changing basic conditions in warehouse operation producing increasing operating deficits, and other

factors which the assessing authorities are bound to judicially investigate, to which they are bound to give *effective consideration*, and which no prudent prospective purchaser would overlook or fail to consider in determining what price he would willingly pay for the property in order to profitably operate it as a going business enterprise. Neither would such purchaser overlook the steadily increasing burden which the City's asserted exorbitant assessment, coupled with its likewise steadily increasing tax rate, imposes, persistently advancing to a point where inevitably it will become confiscatory. All these elements were taken into consideration by the witnesses for the Warehouse Company in fixing their expression of true value as between a willing buyer and a willing seller under a *bona fide* contract, which is the correct criterion under the law and the State and Federal Constitutions. And this was in nowise refuted by the City. The State Board, however, on appeal, disregarded the unrefuted testimony, ignored the settled principles of applicable law, and fixed its own arbitrary valuation of the property without notice to the taxpayer. The Supreme Court, nevertheless, sustained the State Board's action, but without a review and determination of the facts; and the Court of Errors and Appeals affirmed the Supreme Court *per curiam*.

XII.

Petitioner therefore respectfully submits that the judgments of the Court of Errors and Appeals of New Jersey, affirming the judgments of the Supreme Court, which in turn affirmed the aforesaid determination, judgments, rulings and proceedings of the State Board of Tax Appeals, should be in all things reversed, set aside and for nothing holden, and that this Honorable Court may issue its writ or writs

of certiorari to review the final judgments of said Court of Errors and Appeals, directed to said Court or to the New Jersey Supreme Court, whichever may presently be the Custodian of the record of the proceedings, to the end that the prayer of its petition may be granted, and respectfully submits herewith the Brief annexed hereto in support of its petition.

Respectfully submitted,

JOHN A. HARTPENCE,
Counsel for Petitioner.